Attel Fin. S.A. v Lefebvre
2022 NY Slip Op 31394(U)
April 29, 2022
Supreme Court, New York County
Docket Number: Index No. 154485/2021
Judge: David B. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART 58**

Justice

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ATTEL FINANCE S.A.,

Plaintiff,

- v -

MANFREDI LEFEBVRE,

Defendant.

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INDEX NO. 154485/2021

MOTION SEQ. NO. 001

INTERIM DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 60 were read on this motion to/for ORDER OF ATTACHMENT.

Plaintiff Attel Finance S.A. moves, by order to show cause and pursuant to CPLR 3213, for summary judgment in lieu of complaint in the amount of $5,815,787.55, which defendant Manfredi Lefebvre allegedly owes plaintiff pursuant to a final judgment of an Italian court in 2006 (*see* NYSCEF Doc. No. 8). In addition to seeking a domesticated judgment, plaintiff seeks pre-judgment attachment of defendant's New York assets and expedited discovery "in aid of the attachment order" (NYSCEF Doc. No. 28).

FACTUAL AND PROCEDURAL BACKGROUND

On May 21, 2021, this Court granted a temporary restraining order (TRO) that enjoined defendant "from transferring, conveying, dissipating, disposing, depleting, concealing, removing, or encumbering any assets, accounts, or other property owned directly or indirectly by Defendant to the extent of $5,815,787.55" pending the hearing and determination of the order to show cause, or until a further court order (*id.*). Defendant opposes the order to show cause and cross-

moves for an order that, among other things, dismisses the action,[1] or, alternatively, stays this case pending the outcome of proceedings in Italy, Monaco, and Luxembourg. In either instance, defendant asks the court to vacate the TRO.

In his affidavit in support, Giancarlo Cammarata, the Liquidator of plaintiff's subsidiary, Attel & Cie S.A. (Attel CIE), explains that the judgment arises out of a five billion lire loan that Atell CIE made to Euro-Belge S.A. (Euro-Belge) in 1992 (NYSCEF Doc. No. 4, ¶¶ 5, 6). Defendant guaranteed the loan. After Euro-Belge went bankrupt in 1993, plaintiff attempted to enforce the guaranty against defendant. In 1994, defendant sued plaintiff in Italy for a different transaction. Defendant argues in its Italian lawsuit that, under a 1990 agreement between the parties, Attel CIE was obliged to purchase two billion lire of corporate stock from defendant.[2] The lawsuit also sought "the return of sums unduly withheld by [Attel CIE] from the company Picos for alleged debts of Lefebvre" (NYSCEF Doc. No. 6 [decision with translation], *5). Plaintiff then counterclaimed for the five billion lire allegedly due under the 1992 guaranty.

After a hearing in January 2002, the Ordinary Court of Rome issued a decision, dated July 23, 2002, rejecting both of Lefebvre's claims (*id.*). In addition, the court awarded Attel CIE five million lire, plus interest, from April 16, 1993.[3] Defendant's appeals were rejected at the appellate and supreme court levels (NYSCEF Doc. Nos. 7-8). The final decision, by the Italian Supreme Court, which is called the Court of Cassation, is dated October 5, 2006.

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[1] When a court denies a CPLR 3213 motion, it has the discretion to dismiss the action or to retain jurisdiction (*see Schulz v Barrows*, 94 NY2d 624, 628 [2000]).
[2] Lefebvre alleged that Attel's president, Fabrizio Cerino, whom he named as a co-defendant in the Italian case, was also bound by this agreement.
[3] The Italian court rejected a portion of Attel's argument, but that is not relevant to the matter at hand.

Plaintiff alleges that, on December 21, 2007, over a year after the final order was issued, Attel CIE "assigned and transferred the Italian Judgment to Plaintiff, its parent company, making Plaintiff the legal holder of the debt owed by Defendant to Attel [CIE]" (NYSCEF Doc. No. 4, ¶ 9). Since then, plaintiff has commenced actions in Luxembourg, Switzerland, Monaco, the United Kingdom, and Florida, all of which seek to enforce the Italian judgment. Plaintiff maintains that an appeal and discovery are ongoing in Florida but that the other courts have accepted the validity of the judgment. However, efforts to enforce the judgment have been unsuccessful thus far.

Plaintiff argues that summary judgment in lieu of complaint is appropriate in this case. CPLR 3213 allows a party to seek summary judgment in lieu of complaint for "an instrument for the payment of money only or upon any judgment." Further, CPLR 5303 makes the judgment of a foreign country enforceable under CPLR 3213. Plaintiff points out that domestication of the judgment is warranted if "under the law of the foreign country where rendered, [it] is final, conclusive and enforceable even though an appeal therefrom is pending . . ." (CPLR 5302 [a] [2]). If the judgment satisfies the above criteria, its domestication is ministerial rather than discretionary (citing *CIBC Mellon Trust Co. v Mora Hotel Corp.*, 100 NY2d 215, 222, *cert denied* 540 US 948 [2003]). Additionally, plaintiff seeks an order of pre-judgment attachment pursuant to CPLR 6212 (a) and expedited discovery pursuant to CPLR 6220.

Defendant opposes the motion and cross-moves for an order dismissing the action or, in the alternative, vacating the TRO, granting him a protective order, and staying discovery pending the court's decision on the cross-motion, and staying the action in its entirety pending the outcome of his challenges in the Italian, Luxembourg, and Monaco courts. As a threshold issue, defendant contends that the Italian judgment is not final. He notes that the Court of Cassation has

reopened the Italian judgment and a hearing is pending, although it has been delayed due to the Covid-19 pandemic (*see* NYSCEF Doc. Nos. 32, 33). Defendant now claims that there are pending issues regarding the Italian judgment, primarily with respect to the validity of the assignment of the judgment by Attel CIE to plaintiff.[4]

In addition, defendant argues that dismissal or a stay of this case is consistent with the rulings in other courts – specifically, those in Luxembourg and Monaco, which have stayed plaintiff's lawsuits (*see* NYSCEF Doc. Nos. 34, 35). He states that that plaintiff's filing in New York represents another attempt to forum shop, as well as an attempt to satisfy its judgment before a potential adverse ruling in Italy.[5]

Defendant further argues that the TRO must be vacated because plaintiff cannot demonstrate irreparable harm. In particular, defendant maintains that money damages can compensate plaintiff (citing *Di Fabio v Omnipoint Communications, Inc.*, 66 AD3d 635, 636-637 [2d Dept 2009]) and that plaintiff's allegation to the contrary is speculative (citing *Copart of Conn., Inc. v Long Is. Auto Realty, LLC*, 42 AD3d 420, 421 [2d Dept 2007]).[6]

In response, plaintiff argues that, because defendant has not argued against the applicability of CPLR 3213, he has not shown that summary judgment in lieu of complaint is

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[4] Defendant relies on the fact that a copy of the assignment contained various differences from the original copy. According to plaintiff, the Italian court noted the differences and agreed that the copy was not authentic, but found that this did not "allow[] it to question the substance of the assignments" (NYSCEF Doc. No. 36 [plaintiff's notice of withdrawal of Monaco claim], *4).

[5] Defendant also mentions a defamation judgment against plaintiff in Italy (NYSCEF Doc. No. 41). The defamation judgment was not based on the Italian judgment. Instead, the Italian court found that in a letter to JP Morgan, plaintiff violated defendant's "right to be forgotten" when it referred to an alleged conviction that had occurred more than 20 years earlier.

[6] Defendant also argued lack of proper service, but this Court granted an extension of time and plaintiff has filed the affidavit of service (*see* NYSCEF Doc. Nos. 60, p 5 line 5 – p 6 line 14; NYSCEF Doc. No. 56). In addition, on July 1, 2021, after defendant's cross motion challenged plaintiff's failure to file an undertaking, plaintiff filed an undertaking with this Court (NYSCEF Doc. No. 50).

inappropriate. It reiterates that there is no personal jurisdiction requirement here, and that defendant cannot show that an exception to CPLR 5304 exists herein. Plaintiff asserts that defendant has misconstrued the law on this issue, since *AlbaniaBEG Ambient Sh.p.k. v Enel S.p.A.,* 160 AD3d 93 (1st Dept 2018) only requires personal or in rem jurisdiction where the validity of the foreign judgment is in dispute. In support, plaintiff notes that, in *Akhmedova v Akhmedov,* 189 AD3d 602, 604-605 (1st Dept 2020), the Appellate Division, First Department makes this precise distinction.

Plaintiff argues that defendant's current appeal to the Italian Court of Cassation is not good cause for dismissal or a stay, because defendant has appealed the Italian judgment repeatedly and without success. It notes that, under CPLR 5302, a judgment may be domesticated even if there is an appeal pending. Plaintiff also rejects defendant's argument that the Italian judgment should be nullified based on fraud (CPLR 5304 [b] [3]). It argues that the alleged fraud – the assignment of the judgment from Attel CIE to Attel –is not related to the procurement of the judgment in the Italian court system (citing *Marshall v Fleming*, 161 AD3d 496, 497 [1st Dept 2018]). Moreover, it argues that there was no fraud, that Attel CIE has confirmed the validity of the assignment on many occasions, and that the transfer has no direct impact on defendant or his obligation to pay the judgment.

In addition, plaintiff rejects defendant's arguments against vacating the TRO. Plaintiff again refers to defendant's alleged history of evading the judgment at hand and others as well. Plaintiff urges that it has demonstrated a likelihood of success on the merits and that it has submitted sufficient evidence that defendant has frustrated its efforts to satisfy the judgment. Plaintiff also notes that, if this Court were to grant the instant motion, the issue of the TRO would be moot.

LEGAL CONCLUSIONS

Plaintiff brings this action pursuant to CPLR 3213, which governs summary judgment in lieu of complaint. To prevail under that section, a plaintiff must show that the document in question is an instrument for the payment of money only or a judgment. There is nothing controversial about plaintiff's attempt to enforce the Italian judgment in this fashion. "New York has traditionally been a generous forum in which to enforce judgments for money damages rendered by foreign courts" (*Byblos Bank Europe, S.A. v Sekerbank Turk Anonym Syrketi*, 10 NY3d 243, 247 [2008] [internal quotation marks and citations omitted]). With some exceptions, therefore, "courts of this state shall recognize a final foreign country money judgment . . . as conclusive between the parties . . ." (CPLR 5303 [a]), and "shall be raised by filing an action on the judgment or a motion for summary judgment in lieu of complaint seeking the recognition of the foreign county judgment" (CPLR 5303 [b]).

As noted above, defendant challenges the judgment as nonfinal because of its pending appeal before the Court of Cassation. Plaintiff counters that this Court should consider the Italian judgment as final because so much time has lapsed since Attel CIE was granted judgment, because defendant has lost on the same issue before and, because of the Italian judicial system's lenience in allowing appeals, defendant can use this argument to forestall the entry of judgment for years to come.

Both parties have presented valid arguments. Under CPLR 5302 (a) (2), a judgment may be considered "final, conclusive and enforceable even though an appeal therefrom is pending or it is subject to appeal." As defendant notes, however, this Court has the discretion to stay an action if there is a pending appeal in the foreign country (CPLR 5306). As plaintiff states, it has

attempted to satisfy the judgment since October 2006, and defendant appealed the Italian judgment all the way to the Court of Cassation.

On the other hand, the issue on appeal – the validity of the transfer of the judgment from Attel CIE to plaintiff – is a critical one. Plaintiff argues that there was a valid transfer but that even a fraudulent transfer would not affect the validity of the judgment because the alleged misconduct occurred after the judgment was rendered (*see Marshall*, 161 AD3d at 497). Although plaintiff is correct, if the Italian court determines that the transfer was fraudulent, then plaintiff arguably lacks the standing to step into Attel CIE's shoes and satisfy the judgment. This compelled the Luxembourg court to stay the action before it (*see* NYSCEF Doc. No. 34, *10), stating that:

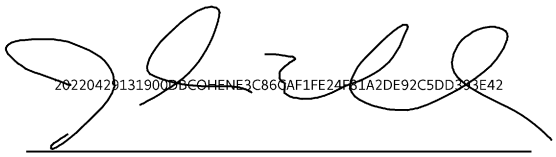
> "The outcome of the criminal complaint for civil case for forgery, use of forged instruments, breach of trust, fraud, and attempted fraud, filed on December 1, 2016, is likely to influence the decision to be taken in this dispute, the request for the enforcement order being admissible only if company ATTEL FINANCE can be considered as an 'interested party', i.e. as the holder of the receivable resulting from the judgment to be enforced. However, this would not be the case if the assignment of receivables and the 'Agreement' which it invokes for this purpose, were forgeries" (NYSCEF Doc. No. 34, *9).

This Court finds the above reasoning persuasive. Further, prior to the pandemic, the Italian court had scheduled a hearing in the parties' case. Since this Court is cautiously optimistic that the Italian appeal will not significantly delay this action, it hereby stays this action pending the determination of the same.

Accordingly, it is hereby:

ORDERED that this matter is stayed pending determination of defendant's appeal in Italy; and it is further

ORDERED that the parties are directed to participate in a conference on October 25, 2022 at 11:00 a.m., via Microsoft Teams, to apprise this Court as to the status of the Italian appeal.



4/29/2022
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE